

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>THOMAS CRAVALHO,</b>	)	
	)	
<b>Petitioner</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 97-246-B</b>
	)	
<b>STATE OF MAINE,</b>	)	
	)	
<b>Respondent</b>	)	

**RECOMMENDED DECISION TO DENY  
PETITION FOR WRIT OF HABEAS CORPUS**

Petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. §2254 following a judgement entered in Maine Superior Court (Penobscot County) convicting him of two counts of sexual assault, in violation of 17-A M.R.S.A. §253; one count of unlawful sexual contact, in violation of 17-A M.R.S.A. §255; and one count of criminal threatening with a dangerous weapon, in violation of 17-A M.R.S.A. §209. The Law Court rejected Petitioner's direct appeal of the conviction on July 15, 1994, and the Superior Court rejected his subsequent post-conviction petition. Petitioner challenges the convictions based on a claim of ineffective assistance of counsel. Respondent has filed an answer to the petition, and the Petitioner filed a reply. After carefully reviewing the record and considering Petitioner's claims, the Court concludes that the Petitioner is not entitled to relief.

**I. Background**

On November 4, 1991, a grand jury in Penobscot County indicted the Petitioner on two counts of sexual assault, one count of unlawful contact and one count of criminally threatening

with a criminal weapon. Following a jury trial, the Petitioner was found guilty of all counts on April 27, 1992. The Court sentenced the Petitioner to a prison sentence of twelve years.

Petitioner challenged his convictions on direct appeal. The issues raised on appeal included: (1) whether the trial court committed reversible error in denying defendant's request for a court ordered psychiatric examination of the victim; (2) whether the trial court should have ordered the prosecuting attorney, against whom the Petitioner filed a grievance against, to recuse himself; (3) whether the trial court committed error by limiting the scope of examination of Cheri Dymond and defense witnesses; and (4) whether the trial court committed reversible error in denying the Petitioner's motion for acquittal based on the evidence at trial. The Law Court denied the Petitioner's appeal on July 15, 1994.

On October 4, 1994, Petitioner sought post-conviction review pursuant to M.R. Crim. P. 67. He claimed numerous instances of ineffective assistance of counsel and the presentation of perjured testimony. The Court held an evidentiary hearing pursuant to M.R. Crim. P. 73 on July 18, 1997. Following the hearing, the Court denied the Petitioner post-conviction relief in the "Findings of Fact and Conclusion of Law" dated July 29, 1997. The Petitioner filed his habeas petition with this Court on November 3, 1997 pursuant to 28 U.S.C. §2254 and supplemented his writ on November 11, 1997.

## **II. Merits**

Petitioner raises five grounds, all involving the Petitioner receiving ineffective assistance of counsel.<sup>1</sup> He claims trial counsel was ineffective for his: (1) failure to object to the child

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<sup>1</sup> There seems to be some confusion on the grounds the petition raises in the initial writ of habeas corpus. Respondent addresses each ground on its merit as well as on the ineffective assistance of counsel claim. The Court reads the Petition as alleging, appropriately, only

witnesses nodding in response to questions<sup>2</sup>; (2) failure to procure from the victim the identification of the Petitioner in the courtroom; (3) failure to address perjured testimony and inconsistent statements against Petitioner.

In the supplemented writ, the Petitioner alleges that he was also denied effective assistance of counsel on his direct appeal. The Petitioner claims that counsel failed to raise several issues that would have strengthened the appeal.

Respondent concedes that the claim of ineffective assistance of counsel at trial was raised on direct review and thus satisfies the exhaustion requirement. Respondent asserts that the Petitioner was adequately represented by counsel at all times and that such matters were properly decided by the state courts.

Ineffective assistance of counsel claims are reviewed under the familiar two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, a Petitioner must show the Court that counsel's performance was deficient. *Id.* at 687. The Petitioner also must show that, but for counsel's deficient performance, the outcome of the trial would have been different. *Id.* The Court is not required to analyze these separate prongs in any particular order; a failure to show prejudice will suffice to defeat a particular claim, without reference to the level of counsel's performance. *Id.* "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's

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ineffective assistance of counsel.

<sup>2</sup>The Court sees no distinction between the Petitioner's claims in ground one and ground three and therefore will address them both as one claim.

perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

***a. trial counsel's failure to object to the child witnesses nodding in response to questions***

Even assuming that Petitioner can fulfill the first prong of the *Strickland* test, he has failed to show how his counsel's failure to object to the child witnesses' nodding in response to questions prejudiced him. Both victims, Cheri and Dominick Dymond testified at the trial. To a number of the questions the victims, ages nine and six, nodded "yes" or "no" and did not offer a verbal answer.. *See*, Trial Transcript at p. 29, 31, 35, 62-63. Petitioner fails to indicate how trial counsel's failure to object to the nodding prejudiced him. Even had counsel objected and the trial judge asked the witnesses to give a verbal answer, Petitioner does not assert that their answers would have been different. Petitioner fails to show that the witnesses head nodding prejudiced the outcome of the trial.

***b. trial counsel's failure to procure from the victim the identification of the Petitioner in the courtroom***

Petitioner also claims that trial counsel rendered ineffective assistance of counsel by not having the victim identify the Petitioner in person in the courtroom. Once again, assuming that the Petitioner could meet the first prong of the *Strickland* test, Petitioner fails to show how the victim's identification of the Petitioner in the courtroom would have changed the result of the trial. Both witnesses identified the Petitioner as "father". *See*, Trial Transcript 29, 39-40,59, 65-66. When referring to the sexual acts committed against them they referred to the perpetrator as

“father”. *See*, Trial Transcript 22, 59. Petitioner fails to show how Cindi or Dominick would indicate any differently if forced to identify the Petitioner by name. Therefore, the Court fails to see how trial counsel’s decision prejudiced the Petitioner at the trial.

***c. trial counsel’s failure to refute perjured and inconsistent testimony offered against the Petitioner***

Petitioner claims that he was rendered ineffective assistance of counsel by his counsel’s failure to refute the lies and inconsistencies told by several witnesses. Once again, assuming the Petitioner can meet the first prong of *Strickland*, he fails to explain how trial counsel’s actions prejudiced him. Petitioner does not indicate what the witnesses would have said if pressed by trial counsel on their alleged perjured or inconsistent statements. Since the Petitioner does not indicate what the witnesses would have said if pressed by trial counsel, he cannot claim that trial counsel’s actions prejudiced him.

***d. failure by Petitioner’s counsel on direct appeal to raise certain legal issues that the Petitioner wanted raised***

Petitioner also raises an ineffective assistance of counsel claim by counsel of direct review. He claims counsel failed to include certain issues on appeal that the Petitioner requested counsel to raise. A client does not have a “...constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgement, decides not to present those points.” *Jones v. Barnes* 463 US 745 (1994). The Petitioner did not have a constitutional right to have counsel raise every issue he requested in appeal. The Court rejects the Petitioner’s claim that he was given ineffective assistance of counsel on direct appeal.

### **III. Conclusion**

For the foregoing reasons, the Court hereby recommends that the Court DENY without an evidentiary hearing the Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254.

### **NOTICE**

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Eugene W. Beaulieu  
United States Magistrate Judge

Dated on March 3, 2000.